

No. 12,157

IN THE
United States Court of Appeals
For the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee joins in the statements made in appellant's opening brief as to the pleadings, the jurisdiction of the District Court of the United States for the Northern District of California, Southern Division, to try this case, and the jurisdiction of this Honorable Court to consider the pending appeal from the District Court's judgment of conviction. (Appellant's Opening Brief, pp. 1, 2 and 3.)

STATEMENT OF THE CASE.

The facts of this case are as set forth in the first two counts of the information. Appellant knowingly

deposited with an express company, to-wit, Railway Express Agency, for carriage in interstate commerce from San Francisco, California, to Olympia, Washington, and to Dallas, Texas, respectively, "a package containing certain matter of an indecent character, to-wit, phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories". (Tr. pp. 2 and 3.)

In his opening brief appellant concedes that he is guilty of the charges made against him in the information, but argues that the information fails to charge an offense against the laws of the United States, and for that reason the judgment of conviction must be reversed.

STATUTE INVOLVED.

The statute under which appellant was charged in the information is Title 18 U.S.C.A. §396, the pertinent portions of which are quoted in appellant's opening brief, page 3.

QUESTIONS INVOLVED.

We do not agree with appellant's statement of the questions involved upon this appeal.

As set forth on page 4 of his opening brief, appellant's statement of the issue is too narrow and his statement of so-called sub-issues is too broad.

The sole issue involved upon this appeal is whether or not the depositing for carriage in interstate commerce, of "phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories" is made an offense against the United States by Title 18 USCA §396, which prohibits the depositing for carriage in interstate commerce, of "any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character".

The only question to be decided upon this appeal is this:

"Do the phonograph records involved in this case constitute objects included in one of the classes of things enumerated in the statute?"

ARGUMENT.

We do not take issue with any of the general principles of law referred to in appellant's brief. We agree with him that criminal statutes should not be extended by intendment simply because the Court thinks the legislature should have made them more comprehensive, and we concede that the doctrine of *ejusdem generis* is particularly applicable to penal statutes.

We do not ask this Honorable Court to extend the application of the statute to any objects not embraced within the plain meaning of the words employed by the Congress.

We submit that a comparison of the language of the information with the language of the statute, giving to the words used in each instance their ordinary meaning, in the light of the context, will demonstrate that the information charges a violation of the statute involved in this case, and that the appellant was properly convicted of an offense against the United States.

I.

APPELLANT'S ARGUMENT THAT, SINCE PHONOGRAPH RECORDS ARE NOT SPECIFICALLY MENTIONED IN THE STATUTE, THEIR SHIPMENT IN INTERSTATE COMMERCE IS NOT AN OFFENSE, UNLESS SUCH RECORDS ARE ENCOMPASSED IN THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" IS WITHOUT MERIT.

If the objects deposited for carriage in interstate commerce come within one of the classes specifically enumerated in the statute, or under the doctrine of *ejusdem generis*, are "other matter of indecent character" of the same general nature or kind as objects of the classes specifically enumerated, then their deposit, for carriage in interstate commerce, comes within the prohibition of the statute.

Appellant's argument states as a premise that the objects involved are not within one of the classes of things specifically enumerated. We think this premise is false, and hence the whole argument leads to a false conclusion.

A. What classes of things are specifically enumerated in the statute?

The statute enumerates "book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character".

In order to determine the precise meaning of this language as used by the Congress, it is necessary to ascribe to the words employed their ordinary meanings, excluding such meanings as would make any of the words synonymous with one another.

It is clear from the language used that the statute applies to all indecent books, pamphlets, magazines, newspapers, manuscripts, letters, and other papers and writings, also to all indecent paintings, lithographs, drawings, photographs, engravings and other pictorial representations of persons or things. All these are embraced in the ordinary meaning of the words "*book, pamphlet, picture, paper, letter, writing*".

The statute (by amendment in 1920) includes "*motion picture film*" as a separate class by itself, Congress presumably considering it more than a "picture".

The statute also includes "*print*" as a class.

The word "*print*" is defined as:

"A mark made by impression; a line, character, figure, or indentation, made by pressure of one thing on another—

A stamp or die for molding or impressing an ornamental design upon an object—

That which receives an impression, as from a stamp or mold;

An impression taken from anything.” (Emphasis added.)

Webster’s New International Dictionary of the English Language (G. & C. Merriam Company, 1924).

Also:

“An impression or mark made upon or sunk into a substance by pressure; imprint—

A reproduction from such an impression—

That which bears the impression of a stamp—

Any pattern used in stamping, etc.” (Emphasis added.)

New Standard Dictionary of the English Language (Funk & Wagnalls, 1924).

Since photographic prints, engravings, and similar “prints” are included in the word “picture” if they are pictorial representations, and matters printed from type are included in the words “book, pamphlet, paper, letter, writing”, it follows that the word “print” as used in the statute, refers to other matters embraced in the accepted meaning of the word—that is, things bearing impressions which are neither “pictures, books, pamphlets, papers, letters, or writings”—impressions which can neither be seen as a picture or read as written or printed language.

B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and obscene, lewd, lascivious and filthy stories are "prints" within the meaning of that term as used in the statute.

While the information does not use the *exact* language of the statute, it does charge the appellant in language *synonymous therewith*.

The statute reads "any obscene, lewd, lascivious, or any filthy * * * print * * *."

The information reads "phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language. * * *"

A "print" is an impression.

To "impress" is to print.

"*Impress*" is defined as

"To press, stamp or *print something in or upon*; to mark by pressure, or as by pressure; to *imprint*—

To apply with pressure or so as to press or *imprint*." (Emphasis added.)

Webster's New International Dictionary of the English Language (G. & C. Merriam Company, 1924).

Also:

"To form or fix by pressure; stamp; *imprint*—Syn. *Imprint*, inculcate, press, *print*, stamp." (Emphasis added.)

New Standard Dictionary of the English Language (Funk & Wagnalls, 1924).

The information does not charge the appellant with depositing for carriage in interstate commerce "obscene phonograph records" as such, but rather with so depositing prints of obscene, lewd, lascivious and filthy language and stories *upon* phonograph records. Such objects are within one of the classes of things specifically enumerated in the statute, and the information therefore charges an offense thereunder.

II.

EVEN IF THE OBJECTS DEPOSITED FOR CARRIAGE IN INTER-STATE COMMERCE ARE NOT WITHIN THE CLASS OF THINGS EMBRACED IN THE TERM "PRINT" AS USED IN THE STATUTE, THEY ARE NEVERTHELESS INCLUDED IN THE TERM "OTHER MATTER OF INDECENT CHARACTER".

- A. The doctrine of *ejusdem generis* requires only that the general words employed in the statute be construed to apply to things of the same general class or nature as those enumerated.

If the things referred to in the information are things of the same *general* class or nature as the things enumerated in the statute, they are included within the term "other matter of indecent character."

"Where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to acts or persons of the same *general* nature or class as those enumerated." (Emphasis added.)

First National Bank of Anamoose v. U. S., 206 Fed. 374 (CCA-8).

B. Phonograph records impressed with recordings of obscene, lewd, lascivious and filthy language and stories belong to the same general class as the objects specifically enumerated in the statute.

An obscene and filthy story impressed upon a phonograph record is not in a class distinct from a similar story printed in a book, or impressed in a piece of wax, or written with a sharp instrument on a block of wood.

Obscene language heard on a phonograph is the same as obscene language read in a newspaper.

All of the objects enumerated in the statute are means for the recordation of obscenities. So is a phonograph record.

All the enumerated objects present the recorded obscenities to the senses. So does a phonograph record.

All the enumerated objects are capable of repeated use in dissemination of obscenities. So is a phonograph record.

All are readily portable. So is a phonograph record.

A book, pamphlet, letter, paper, writing, depend upon the language to record and disseminate obscenity. So does a phonograph record.

All the enumerated objects are capable of telling a story. So is a phonograph record.

All the enumerated objects are capable of being readily concealed from the watchfulness of parental and other authority. So is a phonograph record.

C. Appellant's argument that phonograph records are not in the same general class as the enumerated objects is erroneous.

Appellant's argument is based upon false premises. It is stated (Appellant's Opening Brief, p. 18) that obscene matter is communicated to the human mind in only two ways, through the sense of sight and through the sense of hearing. This is false, as obscenity may also be communicated through the sense of touch.

It is further assumed that all the objects enumerated in the statute communicate obscenity only by visual representation. This premise also is false.

The obscenity contained in the first item enumerated in the statute—"book"—is capable of tactile as well as visual communication. There are many books in circulation which no man may read with his eyes, but which are read by the blind through the sensitive touch of the fingers. Surely appellant would not argue that books so read are any the less "books" because he cannot read them, or that a book printed for the use of the blind would not be within the prohibition of the statute, if it were obscene.

Also, the obscenity impressed on a motion picture film can be heard as well as seen. It is ridiculous to argue that a motion picture film can only present obscenity to the eyes. Perhaps when the statute was amended in 1920 there was no sound-track upon a motion picture film. But there has been for many years, and we must take "motion picture film" to mean what it means today, not what it meant a quar-

ter of a century ago. The common meaning of the words has changed with the times, and Congress, like all of us, has seen the change. Were it the intent of Congress to restrict the application of the statute to "silent" motion picture film, Congress would have amended the statute when the words used came to have a new and different meaning, and in common usage described a new and different object. Since Congress did not see fit to do so, we must assume that Congress intended the "talking" motion picture film to be within the purview of the statute. And would appellant argue that a motion picture film depicting innocuous action, but assaulting the ears with obscenity, is not an "obscene motion picture film" within the meaning of the statute? We think not.

The argument that objects disseminating obscenity by means other than visual representation are not within the prohibition of the statute is therefore fallacious, since two of the objects specifically enumerated are capable of doing so.

Since the dawn of time the purveyors of obscenity and merchants of filth have kept step with progress in the arts and sciences, to bend them all to serve ignoble ends. From crude drawings the Dawn Man made on prehistoric cave walls before a written language was devised by some genius of old, through the days of the stone tablet, papyrus and illuminated manuscript to the time of Caxton, and unto our own day, they have left nothing untouched, no means un-

tried to perpetuate the same old obscenities, and corrupt each new generation throughout the centuries with the same old filth. A book, a pamphlet, a picture, a paper, a letter, a writing, a print, a motion picture film, a phonograph record, whatever will take the impression of a lascivious thought from a lewd and perverted mind they have used, and use today, and will use to the end of time.

CONCLUSION.

For the reasons stated we respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,

April 8, 1949.

Respectfully submitted,

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